Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–903 OF 2005
MOHD GHAZALI, TENGKU BAHARUDIN SHAH AND JAMES FOONG JJCA
16 AUGUST 2006

Civil Procedure — Appeal — Appeal to Court of Appeal — Appeal pertaining to costs — No leave from Court of Appeal obtained — Whether appeal competent — Courts of Judicature Act 1964 s 68(1)(c)

Civil Procedure — Appeal — Costs — Appeal to Court of Appeal pertaining to costs — No leave from Court of Appeal obtained — Whether appeal competent — Courts of Judicature Act 1964 s 68(1)(c)

The respondent successfully opposed an application by the appellant and was granted costs in the High Court. The respondent filed a bill of costs that was taxed down to RM250,000 by the registrar. The appellant, being dissatisfied applied for a review of the registrar's decision. Whilst this application for review was pending, the appellant filed another application (encl 256) seeking, inter alia, to nullify the decision of the registrar; and/or for the bill of costs to be heard afresh. This application was dismissed by the High Court on the basis that it was premature. The appellant's earlier application for a review of taxed costs had yet to be heard, held the High Court. The appellant thus appealed to the Court of Appeal. At the outset of the hearing of the appeal, the respondent raised a preliminary objection pursuant to 68(1)(c) of the Courts of Judicature Act 1964. Since the appeal related to costs and no leave had been obtained by the appellant from the Court of Appeal, the appeal ought to be dismissed, contended the respondent.

Held, dismissing the appeal with costs:

The substantive prayers in encl 256 were all connected to the respondent's bill of costs which had been taxed by the registrar. In essence, the appellant's application in encl 256 was for the revocation of the registrar's order made solely on the issue of costs. The appeal was related to costs only and hence was not competent as leave to appeal had not been obtained (see paras 15–16).

[Bahasa Malaysia summary

Responden telah berjaya menentang satu permohonan oleh perayu dan telah diberikan kos di Mahkamah Tinggi. Responden telah memfailkan satu bil kos yang telah dikenakan cukai RM250,000 oleh pendaftar. Perayu, berasa tidak berpuas hati

A memohon untuk semakan keputusan pendaftar. Sementara menunggu semakan permohonan ini, perayu telah memfailkan satu lagi permohonan (lampiran 256) memohon, antara lain, untuk membatalkan keputusan pendaftaran dan/atau untuk bil kos didengar semula. Permohonan ini telah ditolak oleh Mahkamah Tinggi atas dasar ia adalah pra matang. Permohonan perayu sebelumnya untuk satu semakan kos yang dikenakan cukai masih belum didengar, diputuskan Mahkamah Tinggi. Perayu
B oleh itu telah merayu ke Mahkamah Rayuan. Di permulaan perbicaraan rayuan tersebut, responden telah menimbulkan satu bantahan awal menurut s 68(1)(c) Akta Mahkamah Kehakiman 1964. Memandangkan rayuan itu berkaitan kos dan tiada kebenaran diperoleh oleh perayu daripada Mahkamah Rayuan, rayuan tersebut patut ditolak, tegas responden.

C

Diputuskan, menolak rayuan dengan kos:

Permohonan substantif dalam lampiran 256 semuanya berkaitan bil kos responden yang telah dikenakan cukai oleh pendaftar. Pada dasarnya, permohonan perayu
D dalam lampiran 256 adalah untuk pembatalan perintah pendaftar yang dibuat semata-mata atas isu kos. Rayuan itu berkaitan kos sahaja dan justeru itu tidak kompeten kerana kebenaran untuk merayu tidak diperoleh (lihat perenggan 15–16).]

Notes

E For cases on appeal to the Court of Appeal, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 676–679.
For cases on costs, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 743–744.

Cases referred to

F *Anthony Lucas v The Malayan Cultures Co Ltd* [1933] MLJ 21 (refd)
Crystall v Crystall [1963] 2 All ER 330 (refd)
Wheeler v Somerfield & Others [1966] 2 All ER 305 (refd)

Legislation referred to

G Courts of Judicature Act 1964 s 68(1)(c)
Married Women's Property Act 1882
Supreme Court of Judicature (Consolidation) Act 1925 [UK} s 31(1)(h)

Appeal from: Companies Winding Up No D5–21–179 of 2004 (High Court, Kuala
H Lumpur)

Malik Imtiaz Sarwar (Satha & Co) for the appellant.
M Manoharan (Mahadevi Nadchatiram & Partners) for the respondent.

James Foong JCA (delivering judgment of the court):

I

BRIEF BACKGROUND

[1] The appellant is a contributory of a private limited company known as Nadchatiram Realities [1960] Sdn Bhd ('the said company') that was woundup

pursuant to an order made by the High Court at Seremban on 5 September 1988. The Official Receiver (Liquidator) was appointed liquidator of the said company. The said company is solvent. Concerned that the liquidator was proceeding to dispose off a piece of landed property of the said company, the appellant lodged a private caveat over the same. The liquidator, by way of an ex parte application, successfully removed the said caveat. When the appellant became aware of this, she applied, by way of summons in chamber in encl 209, to set aside this ex parte order. The respondent (who is the second defendant in the winding up petition of the said company) opposed this application. She was successful and encl 209 was dismissed with costs awarded to her. Thereafter, the respondent filed a bill of costs claiming a sum of RM350,000 for getting up fee. On 4 January 2002, the getting up fee was taxed down to RM250,000. The registrar of the court who taxed the bill of costs was one Tuan Mohd Nasir bin Nordin (Tuan Mohd Nasir). Dissatisfied with this decision, the appellant applied for a review of the registrar's decision. While this was pending, the appellant on 15 January 2002 wrote to the Chief Judge of Malaya complaining that Tuan Mohd Nasir was impartial and bias and should be disqualified from hearing any further matter on this case. The Chief Judge of Malaya replied to say that the appellant should make a formal application to the registrar for recusal. On 22 January 2002, a date fixed for assessment of damages for the removal of the caveat placed by the appellant, the registrar, Tuan Mohd Nasir, himself, perhaps having knowledge of the appellant's complaint against him, decided to voluntarily recuse himself from hearing all matters concerning the parties in this case and that of their families. Then on 1 March 2004, the Seremban High Court ordered that this case be transferred to the High Court at Kuala Lumpur. While the review of the decision of the registrar on the bill of costs was still pending, the appellant filed an application (encl 256) seeking the following:

(1) The hearing and decision of the registrar Tuan Mohd Nasir on 4 January 2002 (the taxed bill of costs) be declared null and void.

(2) The bill of costs filed by the respondent be heard afresh before a registrar of the High Court at Kuala Lumpur.

(3) A stay of proceedings, including the issuance of the allocatur for the amount taxed by the registrar on 4 January 2002.

(4) In the alternative, for an injunction to prevent the respondent from extracting the allocatur from the court.

(5) Any further order as is deemed fair and reasonable to grant and that costs be paid by the respondent.

[2] On 10 August 2005, Ramly Ali J presiding in the Kuala Lumpur High Court dismissed encl 256 with costs. His reasons are basically these: the appellant's application is premature since the taxed costs is subject to review and the review is yet to be conducted, and if the appellant has any grievances or dissatisfactions over the attitude of the registrar these could be raised at the review stage before the judge. On the appellant's request for a stay of proceedings, the learned judge found no

special circumstances to support the granting of such order. Dissatisfied with this decision, the appellant appealed to us.

PRELIMINARY OBJECTION

[3] At the outset of the hearing of this appeal, the respondent raised a preliminary objection pursuant to s 68(1)(c) of the Courts of Judicature Act 1964, which reads:

> No appeal shall be brought to the Court of Appeal in any of the following cases: where the judgment or order relates to costs only, which by law are left to the discretion of the Court, except with the leave of the Court of Appeal.

[4] Since no leave has been obtained by the appellant from this court, the respondent pressed for this appeal to be dismissed on the ground that it is incompetent.

[5] Attempting to influence us that this restriction does not apply to the facts of this case, counsel for the appellant cited three cases where the courts were of the view that if a judgment or order relates not only to costs but also to other matters then an appeal can be entertained without leave.

[6] To ascertain the precise nature of such proposition, it is necessary for us to examine each of the cases cited in detail.

[7] The first is *Anthony Lucas v The Malayan Cultures Co Ltd* [1933] MLJ 21 where Murison CJ presiding in the Court of Appeal over a matter that originated from Johore summed up the facts and principle as follows:

> The trouble in this case, originates from a judgment of Thorne J delivered in the action on the 16 March 1932. The plaintiff sued as a pauper. Thorne J gave him judgment for $1,251.08 against the company, and there has been no appeal against that judgment. Thorne J further ordered in his judgment that the plaintiff recover from the defendants the costs of this action to be taxed on the Supreme Court scale.
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> The registrar then proceeded to tax the Plaintiff's costs. He allowed them at $2,129.08 which is a larger sum than the amount involved. The certificate is dated 16 March 1932. In the bill were certain items under the head of 'Profit costs.' The registrar, for reasons which he sets out in the grounds for his decision, was of opinion that, according to the true construction of Thorne J's order as to costs, he ought to allow profit costs to be included in the bill taxed, and he allowed them.
>
> The defendants' solicitor then took out a summons to review the registrar's taxation. This was heard by Burton J who was of opinion that profit costs could not be recovered in a pauper action. He consequently disallowed them A preliminary objection was taken at the hearing of the appeal upon the ground that the appeal, being concerned only with a question of costs, was not competent under s 17(c) of the Johore Courts' Enactment No 17 of 1920. That section says that no appeal shall lie 'where the judgment or order relates to costs only.' This provision (with the addition of the words 'except with the leave of the court or a judge' and a limitation to costs in the judge's discretion) corresponds to the English law contained in s 31(i)(h) of the Judicature Act 1925; and it has been held under that section that if an order relating to costs involves a question of law ana principle, an appeal does lie (James LJ in In Re the Rio Grande, etc [1877] 5 CD at p 284).

In my opinion, therefore, the preliminary objection fails, for it is clear that a question of law and principle is involved in this appeal. A

[8] The second case is the English Court of Appeal case of *Crystall v Crystall* [1963] 2 All ER 330. The facts are these: B

[9] The registrar has allowed the wife's claim under the English ' Married Women's Property Act 1882' for a portion of the proceeds from the sale of the matrimonial home where the husband has insisted that she has no interest what so ever therein. Apart from this finding, the registrar also ordered the husband to pay to the wife costs of 75 guineas. Dissatisfied with the whole decision, the husband appealed to the Court of Appeal. Willmer LJ, delivering the decision of the court first recited s 31(1)(h) of the Supreme Court of Judicature (Consolidation) Act 1925 which reads: C

(1) No appeal shall lie... (h) without the leave of the court or judge making the order, from an order of the High Court or any judge thereof made with the consent of the parties or as to costs only which by law are left to the discretion of the court. D

[10] He then proceeded:

... as I have said, the question arises whether the appeal is competent. In my judgment the appeal is competent, because this is not an appeal as to costs only. I do not think that it falls within the words of the subsection. The appeal, in so far as it relates to costs, is only part of the larger appeal against the order as a whole. Certainly if and in so far as any appeal to this court succeeds it must be competent for this court to deal with any order for costs made below. Even if this court were not disposed, in the event, to interfere with the main part of the order under appeal, it would still be competent to deal with the appeal in so far as it relates to costs. For it is not possible to say of such an appeal that it is an appeal relating to costs only. The view which I have expressed is, I think, supported at any rate by two cases to which we have been referred, *Forbes-Smith v Forbes-Smith and Chadwick* (1), and *Griggs v Petts* (2). I do not think that it is necessary to refer to the facts of those cases; but, as I have said, I think that they do lend support to the view which I have expressed. E F G

[11] The third case is another English Court of Appeal decision of *Wheeler v Somerfield & Others* [1966] 2 All ER 305. The facts are:

[12] The plaintiff has brought a libel action against the defendant for four passages in an article appearing in a weekly newspaper. He then sought leave of the court to amend his statement of claim to include a new para 2A which says that by innuendo the article meant that he is a dishonest and untrustworthy businessman. To support this, the plaintiff gave particulars of one hundred articles printed in the defendant's newspaper about other people. The trial judge rejected this claim under the amended para 2A but permitted the four passages in the article to be proved. The jury found two out of the four passages constituted libel and awarded damages of 1,650 pounds to the plaintiff. Since the plaintiff appeared in person, the trial judge allowed him costs. But for the dismissal of the claim in para 2A, the jdge granted costs to the defendant. The plaintiffs taxed costs amounted to only 20 pounds 14 shillings. But the taxed costs of the defendant's against the plaintiff came up to 391 pounds 14 H I

shillings 8 pence. Dissatisfied with the entire decision, including that of the dismissal by the trial judge of his para 2A, the plaintiff appealed. During the appeal, the defendant raised the issue on the competency of this appeal under s 31(1)(h) of the English Supreme Court of Judicature (Consolidation) Act 1925 which prohibits the plaintiff from appealing unless leave is obtained from the trial judge who issued the said order and this has not been secured by the plaintiff.

[13] After dismissing the plaintiff's appeal on the substantive issue on the law of defamation, Lord Denning has this to say on the competency of the appeal relating to costs:

> It was said that, seeing that in the result the plaintiff has failed on the substantive points, this appeal comes down to an appeal as to costs only and, therefore, it is prohibited without the leave of the trial judge.
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> I do not agree with that interpretation. As I have always understood this section of the Act of 1925, it means this: if a person makes no complaint against the judgment below, except about the order for costs, then he must obtain the leave of the trial judge before he can come to this court. If he makes a complaint, however, not only about the costs, but also about other matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he fails on the other matters, this court has jurisdiction to deal with the costs. His complaint on the other matters must, of course, be genuine. That is what has happened in this case. The plaintiff has brought genuine complaints of other matters. He has also complained about the costs. Although he has lost on the other matters, nevertheless his appeal as to costs stands. It is within the jurisdiction of the court to consider it.

[14] Though there is a slight difference in the wordings between s 31(1)(h) of the English Supreme Court of Judicature (Consolidation) Act 1925 and our s 68(1)(c) of the Courts of Judicature Act 1964 regarding the venue to apply for leave to appeal, the objective of these two pieces of legislation is similar. They are intended to restrict appeal where judgment or order relates to costs only which by law is left to the discretion of the court. But from the cases cited, this restriction does not apply to situation where the judgment or order as to costs involves law and principle or it is part of a larger appeal which includes other matters. We find this proposition sound and rational and reflects the current state of our law. With these principles fixed in our minds, we now turn to examine the facts of our instant case.

[15] If one looks at the substantive prayers in encl 256 one would discover that they are all connected to the bill of costs of the respondent which was taxed by the registrar. In the first prayer, the appellant requested that the registrar's order be set aside. In the second and third prayers, the requests are for consequential orders in the event that the first prayer is allowed. And then the fourth prayer is pleaded in the alternative to the third prayer which again is dependent on the success of the first prayer. Therefore, in essence the appellant's application in encl 256 is for the revocation of the registrar's order made solely on the issue of costs. In dealing with an appeal of this nature, we must not lose sight of the true character of the matter under appeal. The appellant's attempt to convince us that the order of costs involves law and principle and that it is part of a larger appeal are all, but a smoke screen to hide the true character of the matter under appeal. For this, it is necessary for us to

be vigilant against such attempt to blur our vision from only hearing appeals which are competent. On this, we are not without authority for support. In *Wheeler v Somerfield*, Harman LJ has this to say:

> If, of course, his appeal is as to the costs only or if the court should be satisfied that that is all he really intended to appeal about and has put in the other issues as a kind of 'smoke screen', it may be that the court will refuse to entertain the real object of the appeal, which is in truth against the order as to costs only.

[16] As far as this appeal is concerned, we are of the view that it relates to costs only and hence is not competent as leave to appeal has not been obtained.

CONCLUSION

[17] Based on the reasons aforesaid, we dismissed this appeal with costs. We also ordered that the deposit for this appeal be paid towards the account of taxed costs.

[18] These grounds of judgment have the concurrence of my learned brothers, Mohd Ghazali and Tengku Baharudin Shah JJCA.

Appeal dismissed with costs.

Reported by John Paul Simon